U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 99 113 50091 Office: Vermont Service Center Date: JAN 18 2001

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER: [redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant which seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of October 14, 1997, the filing date of the visa petition.

On appeal, the petitioner provides a statement and indicates that a brief will be submitted within thirty days. To date, however, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is October 14, 1997. The beneficiary's salary as stated on the labor

certification is $9.07 per hour or $18,865.60 annually.

The petitioner initially submitted a copy of Form 1120 U.S. Corporate Income Tax Return for the fiscal year December 1, 1996 through November 30, 1997. The Form 1120 reflected gross receipts of $272,283; gross profit of $154,987; compensation of officers of $0; salaries and wages of $18,228; depreciation of $5,586; and taxable income before net operating loss deduction and special deductions of $9,735. Schedule L reflected total current assets of $18,632 of which $11,382 was in cash and total current liabilities of $22,999. This evidence was determined to be insufficient to establish the ability to pay the proffered wage and on July 20, 1999, the director requested additional evidence that the petitioner had the ability to pay the proffered wage as of October 14, 1997.

In response, counsel submitted another copy of the petitioner's Form 1120 U.S. Corporate Income Tax Return for the fiscal year December 1, 1996 through November 30, 1997.

The director concluded that the documentation submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly.

On appeal, counsel states the following:

> The Vermont Service Center ("VSC") incorrectly and immpermissably determined that petitioner's proffered evidence namely - the 1996 income tax return were irrelevant with respect to the date of filing the labor petition (10/14/1997), when in fact the tax submitted covered from December 1, 1996 through November 30, 1999. The VSC failed to consider the proper tax originally submitted and when resubmitted.
>
> VSC also failed to take into consideration that the petitioner clearly demonstrated the ability to pay the proffered wage. The petitioner's tax demonstrates that it paid salary totals of $18,228. In addition, assets of cash of $11,382. An accumulated depreciation of $25,918 and $5,586. All these items should be added against the net operating income of $9,735. This will result in a total of $52,621 which is three fold the amount required to pay the proffered wage.

A review of the federal tax return shows that when one adds the taxable income; the depreciation (only the depreciation claimed for

that year may be included); and the cash at year end (to the extent that total current assets exceed total current liabilities), the result is $15,321, $3,544.60 less than the proffered wage. Total current liabilities exceeded total current assets by $4,367, and the cash on hand at the end of the year may not be included in the ability to pay the proffered wage.

The beneficiary's Form W-2 Wage and Tax Statement was not included in the evidence and, therefore, the amount of his wages cannot be added to the figures above to determine the petitioner's ability to pay the proffered wage.

Furthermore, the fact that the petitioner paid wages does not establish the petitioner's ability to pay the additional wage of the beneficiary. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage.

Accordingly, after a review of the federal tax return and additional documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.